

IN THE MATTER OF	:	BEFORE THE
CONVENIENCE RETAILING, LLC	:	HOWARD COUNTY
	:	BOARD OF APPEALS
Petitioner	:	BA Case No. 08-049C
:.....:		

**DECISION AND ORDER**

The Howard County Board of Appeals (the "Board") convened on April 30, 2009, May 12, 2009, July 14, 2009, and August 17, 2009 to hear and deliberate the petition of Convenience Retailing, LLC, Petitioner, for a conditional use for a gasoline service station in combination with a convenience store and car wash in a PEC (Planned Employment Center) Zoning District, filed pursuant to Section 131.N.25 of the Howard County Zoning Regulations (the "Zoning Regulations").

Board members Albert Hayes, Kevin Doyle and Henry Eagles were present for all of the above-mentioned hearing dates. Board member Maurice Simpkins was present for all the above-mentioned hearings, except for the July 14, 2009 hearing. Board member Simpkins listened to a recording of the July 14, 2009 hearing for which he was not present. Board member Albert Hayes presided over all four hearings. Board member James Walsh did not participate in the hearings.

The Petitioner was represented by counsel, Andrew H. Robinson. Richard Futrovsky served as a spokesperson for many of the individuals in opposition to the petition, pursuant to Board of Appeals Rules of Procedure 2.208(e). Barry M. Sanders, Assistant County Solicitor, served as legal advisor to the Board.

Protestant Richard Futrovsky provided certifications that the notice of hearing was advertised and that the property owner and the adjoining property owners received notice of the

hearing. The Board members participating in the decision indicated that they had viewed the property as required by the Zoning Regulations.

The case was conducted in accordance with Section 2.209 of the Board's Rules of Procedure. The Howard County Code, the Howard County Charter, the Howard County Zoning Regulations, the various agency comments, the Department of Planning and Zoning Technical Staff Report dated December 5, 2008 recommending approval of the proposed conditional use for a gasoline service station with convenience store and car wash, the General Plan for Howard County, the General Plan of Highways, and the Petition and Plat submitted by the Petitioner were incorporated into the record by reference.

The following persons testified on behalf of the Petitioner: Peter Stone, Richard Levitan, Mickey Cornelius, Ellen Rhudy, Brian Jolles, and Brian Dare.

The Petitioner proffered, and the Board accepted, the following documents into evidence:

**Petitioner's Exhibits**

- Exhibit #:      1.      Revised conditional use plan
2.      Photograph of existing site conditions
3.      Site renderings of proposed elevations
4.      Rendering of proposed signage
5.      Photograph of the existing site conditions on Birmingham Way
6.      Photograph of the existing site conditions on Birmingham Way
- 7 – 12. Photographs showing sight distances
- 13 – 16. Photographs of delivery trucks at Waverly Woods Shopping Center

The following persons testified in opposition to the petition: Gerard McIntyre, John Nader, Fred Leong, Sarah Lenes, Devora Pontell, Richard Futrovsky, David Maggiacomo,

Michelle Innerbichler, Rajesh Nayak, Arline Calaby, Mitchell Kim, and Keehwan Kwan.

The opponents proffered, and the Board accepted, the following documents into evidence:

**Protestants' Exhibits**

- Exhibit #:     1.     Traffic counts
2.     Aerial photograph of the area
3.     Photographs of school area

As a preliminary matter, on April 30, 2009, the Petitioner submitted a revised conditional use plan to the Board, shown as Petitioner's Exhibit #1. In accordance with Board Rules of Procedure 2.202 (b&c), the Board considered whether or not the amendments made to the plan were substantive in nature. The Board found that the amendments were not substantive in nature and continued with the hearing.

**FINDINGS OF FACT**

Based upon the evidence presented at the hearings, the Board makes the following Findings of Fact:

1.     The subject property is located in the 3<sup>rd</sup> Election District on the south side of Birmingham Way, approximately 525 feet southeast of the intersection of Warwick Way and Birmingham Way. The Property is referenced on Tax Map 16, Grid 5, as Parcel 429, C-1 and D-1, and is also known as 10825 Birmingham Way (the "Property").

2.     The proposed area of the conditional use is an irregularly shaped, 0.91-acre Site located within the existing paved parking lot of the Waverly Woods Shopping Center. It comprises the northeastern corner of Parcel C-1 and a portion of the northwestern corner of the adjoining Parcel D-1 (the "Site"). The Site has frontage along Birmingham Way and on the west

side of the shopping center entrance drive and is situated approximately 525 feet southeast of the intersection of Warwick Way and Birmingham Way. The topography of the Site is relatively flat. The Waverly Woods Shopping Center does not contain wetlands, flood plains, significant steep slopes, and/or forested areas.

3. Vicinal properties include the following:

a) Across Birmingham Way to the northeast and east is a POR-zoned (Planned Office Research), multi-story, age-restricted adult housing apartment building known as Waverly Gardens, beyond which are R-SA-8-zoned, single-family attached dwellings fronting on local streets.

b) To the south and east of the proposed access drive is the shopping center and beyond it, the R-A-15-zoned residential condominiums of the Fairway Courtyard II development. To the west is the shopping center.

4. Birmingham Way has 44 feet of paving within an 80-foot right-of-way. There is no traffic volume data available for Birmingham Way. The estimated sight distance from the existing Birmingham Way driveway entrance is more than 300 feet to the east and west.

5. The Property is served by public water and sewer.

6. The 2000 General Plan Policies Map 2000-2020 designates the Property as "Residential Areas and Mixed Use Center." The conditional use plan depicts Birmingham Way as a Minor Collector with an 80-foot right-of-way.

7. The Property is served by public water and sewer.

8. The Petitioner proposes to construct a gasoline service station conditional use with convenience store and car wash facility accessory uses within a PEC Zoning District. As depicted on the conditional use plan, the Petitioner is proposing to construct a total of six free

standing double-sided fuel pumps (twelve refueling stations) on the western half of the conditional use Site. The fuel pumps will be located under a raised 21-foot tall canopy which will connect to the convenience store facility to the east by way of a feeder canopy. One refueling pump shall be equipped to dispense diesel fuel along with gasoline.

The Petitioner is proposing a convenience store accessory use to be located on the eastern half of the conditional use Site. The convenience store use shall consist of 1,800 square feet and shall be oriented toward the west in the direction of the remaining parking areas of the Waverly Woods Shopping Center.

The Petitioner is proposing to construct a car wash facility to the immediate east of the convenience store. The car wash facility will encompass 1,080 square feet and will provide for vehicle stacking up to a total of eight cars along the eastern and southeastern edges of the conditional use Site.

A vacuum island and air tower would be located within an island adjacent to Birmingham Way.

The conditional use Site shall provide a total of seventeen parking spaces, nine parking spaces (including two disabled spaces) will be located in front of the store, with eight additional spaces adjacent to Birmingham Way.

The conditional use Site will be screened along the northern, eastern, and southern perimeters in accordance with the Howard County Landscaping Manual.

The exterior of the proposed improvements approved by the Waverly Woods Architectural Review Committee will be designed to match and compliment the adjacent architecture of the Waverly Woods Shopping Center and the nearby bank facility.

Birmingham Way and the existing driveway to the Waverly Woods Shopping Center will

provide access to the Site, as will the existing shopping center parking lot lanes located throughout the Waverly Woods Shopping Center. No additional road connections are proposed under this conditional use.

The proposed conditional use will operate from 5:00 a.m. to midnight, seven days per week. Staffing for the convenience store use will consist of not more than eight employees on a full or part-time basis. No more than three employees will be staffing the store at any given time.

9. Richard Levitan, a principal of the Petitioner, testified and stated that the closest gas stations to the Waverly Woods community were located approximately 3.7 miles and 5.1 miles away from the proposed conditional use Site and that none of these stations were convenient to the residents of Waverly Woods in terms of its location or accessibility. Mr. Levitan stated that the Site is the most appropriate location for a gasoline service station within this development, as it is strategically located between the residential and employment components of the development, and located on roads constructed to sufficient standards to accommodate the uses.

Mr. Levitan stated that modern gasoline service facilities, when attractively designed and landscaped in a commercial zoning district, present very little adverse impact from noise, dust fumes, vibrations, solid waste or hazards on neighboring properties. Mr. Levitan testified that the existing conditional use Site is currently used as a parking lot facility for the Waverly Woods Shopping Center and handles motor vehicle traffic on a daily basis in connection with the commercial operations in the center, including large multi-axle delivery trucks which service Weis Markets and the other tenants of the Waverly Woods Shopping Center on a daily basis. Mr. Levitan stated that the lighting proposed under the fuel pump canopy will be designed so as

to be flush mounted and shielded from all neighboring properties. Mr. Levitan stated that the canopy lighting will be directed downward and that there will be no additional illumination or horizontal light trespass beyond the property lines. In addition, Mr. Levitan stated that proposed conditional use Site is currently illuminated by pole lighting along the periphery of the parking lot facility and no additional pole lighting is proposed with this proposed use.

With specific regard to the proposed car wash facility, Mr. Levitan stated that additional landscaping and the proposed monument identification sign will be installed along the northern edge of the property, at the exit of the car wash, to block the horizontal trespass of light emitted by cars exiting the car wash facility.

Mr. Levitan testified that the conditional use will operate a propane exchange on-site and that those tanks will be stored outdoors in a metal lattice enclosure located along the perimeter of the convenience store.

Mr. Levitan testified and stated that the architecture, elevations, and layout of the plan have received the approval of the Waverly Woods Architectural Review Committee.

10. Peter Stone, a landscape architect and land planner, testified that the proposed landscaping would consist of a Type "E" and "B" buffers along the northern, eastern, and southern perimeters of the conditional use Site. Mr. Stone stated that the total landscaping area comprises about 21% of the Site. Mr. Stone testified that the proposed structures and uses as set forth on the plan meet all setback requirements and height restrictions in the PEC zoning district. Specifically, he noted that the height of the convenience store would be about 21 feet in height. Mr. Stone testified that the proposed gasoline service station use with accessory car wash and convenience store uses must provide a total of eight parking spaces. The Petitioner is providing an additional nine spaces for a total of 17 parking spaces.

Mr. Stone stated that the proposed dumpster pad Site will be located in the northwestern corner of the Site. Mr. Stone testified that the dumpster pad Site will be enclosed within a masonry wall enclosure and will be screened by a Type "E" landscape buffer.

Mr. Stone testified that the conditional use Site has approximately 160 feet of frontage along the public street right-of-way known as Birmingham Way and does not border a residential district.

Mr. Stone testified and stated that the conditional use Site can easily accommodate two-way traffic throughout its interior and along the proposed access way to be constructed along the private access drive. Mr. Stone discussed the special attention given to the design of the conditional use Site to ensure that motor fuel delivery trucks could safely and efficiently make fuel deliveries to the proposed use with minimal disruption to the interior circulation of the Waverly Woods Shopping Center and the manner by which such deliveries will be made.

Lastly, Mr. Stone testified that the total square footage attributable to the proposed conditional use Site is 39,540 square feet (.91 acres). Mr. Stone stated that the gross square footage of floor area attributable to the convenience store and car wash uses and their parking, loading, storage areas pursuant to Section 131.N.25.i. of the Zoning Regulations is 6,359 square feet. Thus, when the minimum lot size of 20,000 square feet is increased to accommodate the gross square footage referenced above (6,359 square feet), the minimum lot size for the proposed conditional use is increased to 26,359 square feet. Mr. Stone testified that the conditional use area (39,640 square feet) exceeds the revised minimum lot size required under the Zoning Regulations.

11. Mickey Cornelius, a traffic engineer, testified and stated that based upon the data and conclusions of the Traffic Impact Analysis he prepared in preparation for this proposed



conditional use, and his own professional experience in the traffic engineering and transportation planning field, that the Petitioner's proposed conditional use would have little to no impact on the existing traffic conditions affecting the streets and intersections servicing the conditional use Site. Mr. Cornelius based his conclusion on the following factors, to which he testified:

(i) Detailed traffic counts were taken at the following four intersections servicing the conditional use Site between the peak traffic hours of 7-9 a.m. and 4-6 p.m. on typical weekdays while school was in session:

(a) Marriottsville Road and Warwick Way;

(b) Birmingham Way and the shopping center access drive off of Birmingham Way;

(c) Warwick Way and the shopping center access drive off of Warwick Way; and

(d) The four way intersection at Warwick Way, Enfield Drive, Birmingham Way, and Star Chaser Circle.

(ii) Based upon the traffic counts ascertained during the above-mentioned study periods, Mr. Cornelius concluded that each of these four intersections currently operates at an acceptable "level of service" during both morning and evening peak hours.

(iii) Peak hour trip estimates were generated with respect to the proposed operations of the Petitioner's conditional use based upon calculations provided by the Institute of Transportation Engineers' Trip Generation Handbook.

(iv) The resulting trip generation estimates provided by the Institute of Transportation Engineers' Trip Generation Handbook for the proposed conditional use were as follows: 122 morning peak hour trips and 161 evening peak hour trips.

(v) Mr. Cornelius qualified the trip generation estimates further by stating that for gasoline service station uses, the Institute of Transportation Engineers projects that approximately 62% of the morning peak hour trips and 56% of the evening peak hour trips will be "pass-by trips." As a result, the estimated "new" trips to the conditional use Site should be reduced further to a mere 46 trips during the morning peak hours and 71 during the evening peak hours.

(vi) The trip generation estimates obtained through the Institute of Transportation Engineers' Trip Generation Handbook indicate that the proposed conditional use at the present location will not reduce the levels of service at any of the four above-mentioned intersections servicing the conditional use Site.

Mr. Cornelius testified and stated that the conditional use Site will derive its primary ingress and egress access through the private access drive into the Waverly Woods Shopping Center off of Birmingham Way. Mr. Cornelius stated that access to the conditional use Site will be provided approximately 187 feet south of the intersection of the private access drive and Birmingham Way via a proposed curb cut in the location indicated in the conditional use plan. Mr. Cornelius concluded that the curb cut access will provide a lane twenty four feet in width and adequately permit two-way traffic.

Mr. Cornelius stated that sight distance conditions affecting the conditional use Site are safe with adequate sight distance based on actual conditions with respect to the following intersections: (a) the proposed curb cut into the existing private access drive servicing the Waverly Woods Shopping Center; (b) Birmingham Way and the private access drive servicing the Waverly Woods Shopping Center; and (c) Warwick Way and the secondary private access drive servicing the Waverly Woods Shopping Center.

Based on the location of the conditional use Site within the existing Waverly Woods Shopping Center, Mr. Cornelius concluded that a significant percentage of the traffic to and from the conditional use Site will utilize the access drive onto Birmingham Way. Nevertheless, Mr. Cornelius stated that the current sight distances along the proposed access drive and the intersection with Birmingham Way and Warwick Way are more than adequate for the proposed Site and provide safe access to the conditional use Site. Mr. Cornelius testified that sight distances at the intersection of the Waverly Woods Shopping Center private access drive and Birmingham Way are greater than 445 feet in both directions. Per Mr. Cornelius, sight distances at the intersection of the secondary private access drive and Warwick Way are greater than 445 feet to the west and approximately 300 feet to the east. Mr. Cornelius noted that both existing private access drives into the Waverly Woods Shopping Center were approved during the original development of the Waverly Woods Shopping Center and is currently in use without issue.

Mr. Cornelius prepared a crash history report based upon the most recent crash data from the Maryland State Highway Administration with respect to the four closest intersections to the conditional use Site: (i) Marriottsville Road and Warwick Way; (ii) Birmingham Way and the Waverly Woods Shopping Center access drive off of Birmingham; (iii) Warwick Way and the Waverly Woods Shopping Center access drive off of Warwick Way; and (iv) the four way intersection at Warwick Way, Enfield Drive, Birmingham Way, and Star Chaser Circle. Based upon his review of the data, Mr. Cornelius stated that only four total crashes had been reported at these intersections during a three year study period. Mr. Cornelius noted that three of the four crashes occurred at one intersection in particular, Marriottsville Road and Warwick Way, located approximately one-half mile from the conditional use Site.

Based upon his review of the sight distance conditions at the conditional use Site and the crash test data, Mr. Cornelius concluded that the access driveways affecting the conditional use Site are designed and located to ensure safe and efficient movements of traffic and pedestrians and that the ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions.

12. Ellen Rhudy testified in support of the petition and stated that the community near the proposed conditional use Site truly needs a gas station.

13. Brian Jolles testified in support of the petition and stated that he has been a resident in the Waverly Woods area for 17 years and that he wholeheartedly supports the petition.

14. Brian Dare testified on behalf of Oekos Management Corporation, the owner of the Waverly Woods Shopping Center, and stated that Oekos purchased the Waverly Woods Shopping Center with the understanding that the existing PEC zoning would allow the construction of a gasoline service station. Mr. Dare stated that Oekos was familiar with the location and proposed layout of the Petitioner's proposed gasoline service station use within the Waverly Woods Shopping Center and does not believe that the development of the use will generate any adverse effects for the existing tenants or patrons. Mr. Dare opined that the proposed conditional use would keep the Waverly Woods Shopping Center economically viable and benefit the community.

15. Gerald McIntyre testified in opposition to the petition and stated that he opposes the idea of locating a gasoline service station within a residential area. Mr. McIntyre also expressed his concern that the proposed gasoline service station would add vehicular traffic and draw trucks to the area.

16. John Nader testified in opposition to the petition and stated that his main concern is

that the proposed gasoline service station in combination with a car wash and convenience store will generate a lot of traffic from nearby local roads such as Dorchester Way.

17. Fred Leong testified in opposition to the petition and stated that the hearing examiner erred in not considering the impact of this proposed conditional use upon the nearby residential neighborhood. These include an apartment building for senior citizens and townhouses directly across the street, as well as condos to the east.

18. Sarah Lenes testified in opposition to the petition and stated that her concerns are that the Petitioner is putting the gasoline service station in the center of a residential neighborhood. Ms. Lenes expressed her concern that the proposed use will bring in additional outside traffic and lower property values in the area.

19. Devora Pontel testified in opposition to the petition and stated that she likes her neighborhood without a gasoline service station. Ms. Pontel expressed her concerns that the proposed conditional use will generate an inordinate amount of crime and increase traffic in the area.

20. Richard Futrovsky testified in opposition to the petition and stated that the proposed conditional use was incompatible with the residential district and will have an undue and disproportionate effect upon the residences in the immediate vicinity.

21. David Maggiacomo testified in opposition to the petition and stated that the proposed conditional use belongs on a main thoroughfare. Mr. Maggiacomo stated that the proposed conditional use will bring additional traffic to a residential area. Mr. Maggiacomo performed traffic counts at fifteen minute intervals at a gasoline service station located near MD 198. Mr. Maggiacomo stated that the station that he took counts of is smaller in size than the one being proposed for the Waverly Woods Shopping Center. Mr. Maggiacomo stated that the proposed

gasoline service station will generate much more business than the gasoline service station he did traffic counts on.

22. Michelle Innerbichler testified in opposition to the petition and stated that her main concern is that tractor trailers would utilize the proposed gasoline service station for diesel fueling.

23. Rajesh Nayak testified in opposition to the petition and stated that he is concerned about the adverse effects generated by the proposed uses upon residents living only 200 feet away.

24. Arline Calaby testified in opposition to the petition and read a prepared statement wherein she expressed that her main concern is one of safety. Ms. Calaby was very concerned that more accidents will occur as a result of the proposed uses generating a lot more traffic.

25. Mitchell Kim testified in opposition to the petition and expressed his love for his community. Mr. Kim opined that the proposed use will bring in "outsiders" from I-70 to his neighborhood and raise the crime rate.

26. Keehwan Kwan testified in opposition to the petition and stated that his main concern is that that traffic volume in the area will significantly increase with the proposed gasoline service station.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact, the Board concludes as follows:

#### **I. General Criteria for Special Exceptions (Section 131.B).**

A. Harmony with the General Plan: Section 131.B.1 of the Zoning Regulations requires that a conditional use plan will be in harmony with the land uses and policies indicated in the Howard County General Plan for the PEC zoning district. In evaluating a plan under this

standard, the Board must consider (a) the nature and intensity of the use, the size of the Site in relation to the use, and the location of the Site with respect to streets giving access to the Site; and (b) if a conditional use is combined with other conditional uses or permitted uses on a Site, whether the overall intensity and scale of uses on the Site is appropriate given the adequacy of proposed buffers and setbacks.

The proposal in this case is consistent with General Plan Chapter 5, Community Conservation and Enhancement. This chapter explains that commercial centers contribute to a high quality of life for residents and workers by providing them easy access to the goods and services they need in their normal activities. The proposed gasoline service station is harmonious with this policy, as it will provide area residents and workers with services and encourage users to use the shopping center, a benefit to the center's long-term economic viability.

The proposed uses on the .91-acre Site meet all setback and use requirements. The existing shopping center driveway, parking lot lanes, and Birmingham Way will provide adequate access. The Board therefore concludes that the size of the Site in relation to the use, and the location of the Site with respect to streets giving access to the Site, are harmonious with the General Plan's policy of providing needed services to area residents and workers, in accordance with Section 131.B.1.a.

Additionally, the combination of uses on the Site will occupy about 34,273 square feet of the 39,640 square-foot Site, in compliance with Section 131.N.25.i, as discussed below. Because all proposed uses meet all setback and use requirements, and the Petitioner is proposing a Type "E" buffer along Birmingham Way and a Type "B" buffer along the driveway for a total landscape area of 21 percent (which exceeds the 20 percent minimum requirement), the Board

concludes that the overall intensity and scale of uses on the Site is appropriate given the adequacy of proposed buffers and setbacks, in accordance with Section 131.B.1.b.

B. Adverse Effect: Section 131.B.2 of the Zoning Regulations states in pertinent part that the Hearing Authority shall have the power to permit a conditional use, provided the proposed use at the proposed location will not have adverse effects on vicinal properties above and beyond those ordinarily associated with such uses. In evaluating the Plan under this standard, the Hearing Authority shall consider the following four “adverse effect” criteria: (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading; and (4) access.

When assessing a proposed conditional use under these criteria, we must begin with the realization that virtually every human activity has the potential for adverse impact. Zoning recognizes this fact and, when concerned with conditional uses, accepts some level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in the use. Thus, the question in the matter before the board is not whether the proposed use would have adverse effects in a PEC district. The proper question is whether those inherent adverse effects are greater at the proposed Site than they would be generally elsewhere within the PEC district. *Schultz v. Pritts*, 291 MD. 1, 432 A.2d 1319 (1981); *Mossburg v. Montgomery County*, 107 MD. App. 1, 666 A.2d 1253 (1995). Furthermore, applicants for conditional uses are not required to compare, and concomitantly the Board of Appeals is not to consider, the adverse effects of the proposed use at the proposed location to a reasonable selection or representative sampling of other Sites within the same zone throughout the district or jurisdiction, taking into account the particular characteristics of the areas surrounding those other test Sites. *People’s Counsel for Baltimore County, et al. v. Loyola College in Maryland*, 406 Md. 54, 956 A.2d 166 (2008).



Once a petitioner presents sufficient evidence establishing its proposed use meets the requirements of the statute, it is incumbent upon those opposed to the petition to show the use at the proposed location would cause an adverse effect upon adjoining and surrounding properties unique and different, in kind or degree, than that inherently associated with such a use regardless of its location with the zone. *Mossburg v. Montgomery County*, 107 Md. App. 1, 666 A.2d 11253 (1995).

The persons who testified in opposition to the proposed conditional use have not met their burden of showing the proposed use would have an atypical burden upon adjoining and surrounding properties. The speculative nature of their testimony about increased noise, safety, and traffic does not sufficiently demonstrate any adverse effects unique or different from those ordinarily associated with a gasoline service station in a PEC zoning district. The County Council has already determined that gasoline service stations are presumptively compatible with PEC-zoned communities. In this case there is insufficient credible evidence in the record to defeat this presumption.

For the reasons stated below, the Petitioner has met its burden in presenting sufficient evidence establishing that this proposed use will not have adverse effects on vicinal properties above and beyond those ordinarily associated with a gasoline service station in the PEC district.

1. Physical Conditions. The impact of adverse effects such as noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions will be greater at the subject Site than it would generally be elsewhere in the zone or applicable other zones.

The testimony and evidence indicate the proposed facility will not generate inordinate noise, significant outdoor lighting, or other physical effects detectable with the neighborhood. The lighting will be flush mounted and shielded so that no illumination will encroach over

property lines. The proposed gasoline service station will not generate inordinate noise or other effects and it will be buffered by landscaping. Any noise or odor generated by the uses will be attenuated by distance and will not be greater than those ordinarily associated with such uses. The uses will therefore not generate excessive noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions beyond those inherently associated with a gasoline service station in a PEC zoning district, in accordance with Section 131.B.2.a.

2. Structures. The location, nature and height of structures, walls and fences, and the nature and extent of the landscaping on the Site are such that the use will not hinder or discourage the development and use of adjacent land and structures more at the subject Site than it would generally in the zone or applicable other zones.

Based on the evidence, the Board concludes that the Petitioner has met its burden of demonstrating the proposed use complies with Section 131.B.2.b. The record indicates that the height of all structures will be less than the maximum permitted. The convenience store will be 21 feet high. The landscaping buffers will meet or exceed county standards and there is no material evidence that the inherent operational characteristics of the proposed gasoline service station will discourage the use of adjacent land and structures.

3. Parking and Drives. Parking areas will be of adequate size for the particular use. Parking areas, loading areas, driveways and refuse areas will be properly located and screened from public roads and residential uses to minimize adverse impacts on adjacent properties.

Based on the evidence, the Board concludes that the Petitioner has met its burden of demonstrating the proposed use complies with Section 131.B.2.c. The proposed parking spaces exceed minimum requirements. The Zoning Regulations require 8 spaces and 17 are proposed.

The median areas between the parking areas and the public roads will be landscaped. The dumpster will be enclosed within a masonry wall and the northern perimeter of the walled enclosure housing the dumpster pad Site will be landscaped by a Type "E" buffer.

4. Safe Access. The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate.

Based on the evidence, the Board concludes that the Petitioner has met its burden of demonstrating the proposed use complies with Section 131.B.2d. The use of the existing shopping center driveway will continue to provide safe access with adequate sight distance.

## **II. Specific Criteria for Gasoline Service Stations (Section 131.N.25).**

a. The use will not adversely affect the general welfare or logical development of the neighborhood or area in which the station is proposed and will not have a blighting influence, as a result of a proliferation of gasoline service stations within a particular area.

The closest gasoline service station is located on US 40 at Old Frederick Road, approximately 3.7 miles from the Site. The second nearest station is located about 5.1 miles away in West Friendship. Based on these distances and on the above discussion of adverse impacts, the Board concludes that the proposed conditional use will not adversely affect the area's general welfare or logical development, nor have a blighting influence because of a proliferation of gasoline service stations within a particular area, in accordance with Section 131.N.25.a.

b. The minimum lot size for a gasoline service station is 20,000 square feet. If a gasoline service station is combined with another use on the same lot, the minimum lot size shall be increased in accordance with the provisions of Section 131.N.25.i.

The conditional use Site is 0.91 acres (39,640 square feet) in area and the Property itself is 11.81 acres in size. The 34,273 square-foot use area exceeds the 20,000 square-foot minimum areas and as discussed below, the combination of uses meets the minimum required lot size, in accordance with Section 131.N.25.b.

c. The lot shall have at least 120 feet of frontage on a public road. If at the intersection of two public roads, the total of the frontage along both roads may be used if ingress or egress is provided to both roads.

According to the amended conditional use plan and the testimony of Peter Stone, the Site has about 160 feet of frontage on Birmingham Way, in accordance with Section 131.N.25.c.

d. At least 20 percent of the Site area shall be landscaped. The landscaping plan shall include plantings which enhance the appearance of the Site from public roads and provide appropriate buffering for adjacent uses.

According to the amended conditional use plan and the testimony of Peter Stone, about 21 percent of the Site would be landscaped within the medians, the landscaped island and the perimeter. The proposed use complies with Section 131.N.25.d.

e. Solid walls such as masonry or wood and masonry may be required by the Hearing Authority when the Site borders a residential district. When solid walls are required, landscape planting is required on the outside of the wall.

The Site does not border a residential district; therefore, Section 131.N.25.e does not apply.

f. Refuse areas shall be fenced or screened from view. The plan shall indicate the disposal methods to be used for all waste material generated by vehicle repair operations.

The dumpster will be fully enclosed with a masonry wall and the northern perimeter of

the walled enclosure will be landscaped, in accordance with Section 131.N.25.f. No vehicle repair operations are proposed.

g. Access driveways and on-Site paved areas shall be designed and located to ensure safe and efficient movement of traffic and pedestrians.

Based upon the testimony of Peter Stone, Mickey Cornelius, and the DPZ technical staff report assessment, the Board concludes that the existing driveway, shopping center parking lot lanes, and walkways shown on the conditional use plan will continue to provide safe and efficient movements of traffic and pedestrians, in accordance with Section 131.N.25.g.

h. Operation:

(1) Outside operations shall be limited to the dispensing of gasoline, oil, water, pressurized air, the changing of tires and minor servicing. Storage of all automotive supplies shall be within the main structure.

Proposed outside operations include the dispensing of gasoline, oil, and pressurized air, in accordance with Section 131.N.25.h.1.

(2) Vending machines and the sale of propane are permitted as accessory uses, provided these uses are screened or enclosed if required by the Hearing Authority.

The Petitioner proposes a propane exchange program on-Site and that those tanks will be stored outdoors in a metal lattice enclosure located along the perimeter of the convenience store, in accordance with Section 131.N.25.h.2. No vending machines are proposed.

(3) The premises shall be maintained at all times in a clean and orderly condition, including the care or replacement of plan materials required in the landscaping plan. The responsibility for compliance with this provision shall be with all parties having a lease or ownership interest in the gasoline service station.

Subject to the condition of approval that the Petitioner complies with this condition, the proposed use accords with Section 131.N.25.h.3.

(4) Where the gasoline service station is adjacent to a residential district, its hours of operation and a detailed lighting plan shall be approved by the Hearing Authority.

Although this section does not apply because there is no adjacent residential district, the proposed hours of operation are 5:00 a.m. to midnight, seven days per week, which is reasonable for the use, and the proposed lighting will be flush mounted. No new pole lighting is proposed. The proposed use accords with Section 131.N.25.h.4.

i. Other Uses

(1) Other uses may be located on the same lot as a gasoline service station, including uses permitted in the zoning district as well as car washes and convenience stores, provided that all uses are approved by the Hearing Authority and the minimum lot area is increased to accommodate the combination of uses. At a minimum, the minimum lot size of 20,000 square feet must be increased by an area equal to the gross square footage of floor area, parking area and loading or stacking areas required for the additional uses.

The gasoline services station use will be combined with a 1,800 square-foot convenience store and a 1,080 square-foot car wash. The total area of the proposed uses is 34,373 square feet, including required parking spaces (four each for the station and store under Section 133.D.4.c of the Zoning Regulations) and the eight stacking spaces associated with the car wash (about 3,000 square feet). Since the Site is 0.91 acres in size, or about 39,640 square feet, and the combination of uses is about 34,273, the proposed combination of uses complies with Section 131.N.25.i.1.

The Petitioner's proposal to dispense diesel fuel is a reasonable use for a gasoline service

station located within a Planned Employment Center. Because this use is harmonious with the non-residential component of the Waverly Woods PEC development, the Board approves this use.

The vacuuming use next to the pressurized air dispenser is a reasonable use for a car wash and consistent with the purpose and intent of these regulations. The Board therefore also approves this use.

(2) In the PEC, M-1 and M-2 districts, the gross floor area of convenience stores shall not exceed 3,500 feet.

Because the proposed convenience store will be 1,800 square-feet in area, it complies with Section 131.N.25.i.2.

#### **ORDER**

Based upon the foregoing, it is this 27<sup>th</sup> day of October, 2009, by the Howard County Board of Appeals, **ORDERED**:

That the Petition of Convenience Retailing, LLC, Petitioner, for a conditional use for a gasoline service station with convenience store and car wash in a PEC (Planned Employment Center) Zoning District is hereby **GRANTED**, subject to the following conditions:

1. The conditional use shall apply only to the proposed gasoline service station, as described in the petition and conditional use plan submitted on April 30, 2009 to the Board as Petitioner's Exhibit # 1, and not to any other activities, uses, or structures on the subject property.
2. Outside operations are limited to dispensing gasoline, diesel fuel, pressurized air, the changing of tires, propane gas exchange, and vacuuming.
3. All outside sales of propane shall be screened.

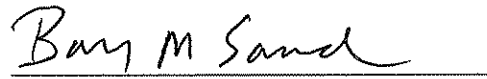
4. The premises shall be maintained at all times in a clean and orderly condition, including the care or replacement of plant materials required in the landscaping plan. The responsibility for compliance with this provision shall be with all parties having a lease or ownership interest in the gasoline service station.
5. Abandonment: The premises (including landscaping) of any gasoline service station which is not in continuous operation or is abandoned shall be maintained in the same manner as is required under these regulations for operating gasoline service stations.
6. Voidance of the Use. The gasoline service station conditional use shall become void upon notice of abandonment by the owner. If notice of abandonment is not received, but it is determined by the Department of Planning and Zoning that a gasoline service station has not been in continuous operation for a period of twelve months, a revocation hearing shall be initiated by the Department of Planning and Zoning in accordance with the procedures set forth in Section 131.L. For purposes of this subsection, "continuous operation" shall mean operation as a gasoline service station at least eight hours per day, five days per week.
7. Removal. If a gasoline service station is abandoned and the conditional use becomes void as provided above, all gasoline pumps, pump island canopies and other improvements (not including buildings) shall be removed from the Site within six months of the date the conditional use becomes void.
8. The Petitioner shall comply with all applicable Federal, State, and County laws and regulations.



**ATTEST:**


  
Ann Nicholson, Secretary

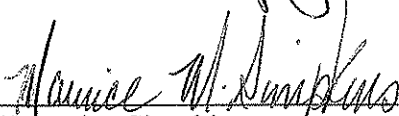
PREPARED BY:  
HOWARD COUNTY OFFICE OF LAW  
MARGARET ANN NOLAN  
COUNTY SOLICITOR

  
Barry M. Sanders  
Assistant County Solicitor

**HOWARD COUNTY BOARD OF APPEALS**

Did Not Participate  
James Walsh, Chairperson


  
Albert Hayes, Vice-Chairperson

  
\*Maurice Simpkins

  
Kevin Doyle

Dissent  
Henry Eagles

\* I Maurice Simpkins certify that I listened to a recording of the July 14, 2009 hearing for which I was not present.

  
Maurice Simpkins

**BEFORE THE  
HOWARD COUNTY BOARD OF APPEALS**

IN THE MATTER OF

**CONVENIENCE RETAILING, LLC**

BA CASE No. BA 08-049

Petitioner

**MINORITY DECISION**

This case came on for hearing before the Board of Appeals on May 12, July 14 and August 17, 2009 requesting approval of a gasoline service station conditional use with convenience store and carwash facility accessory uses within a PEC (Planned Employment Center) Zoning District, pursuant to Section 131.N.25 of the Howard County Zoning Regulations (“Regulations”), to be located within the present Waverly Woods Shopping Center parking lot. On August 17, 2009, the Board voted to grant Petitioner’s application for the conditional use.

It appears to the undersigned Board member that this conditional use does not comply with Regulation 131.N.25.g. providing that “Access driveways and on-site paved areas shall be designed and located to ensure safe and efficient movement of traffic and pedestrians.” The Board denied remand<sup>1</sup> of this case to the Department of Planning and Zoning for further consideration respecting the issue of whether the conditional use gasoline station as designed and

---

<sup>1</sup> Regulation 131.F.2. provides, inter alia, that a petition for conditional use shall be submitted to the Department of Planning and Zoning. Subsection F.5. provides that during the hearing either party may direct a question concerning the findings and recommendations of the Department of Planning and Zoning and the Hearing Authority “shall determine whether the staff of the Department shall respond and the form of the response.” Subsection F.6 provides that a response by the Department of Planning and Zoning to a question concerning the Technical Staff Report may be considered by the Hearing Authority if the response is in writing. It is axiomatic that if either party may direct a question concerning the findings and recommendations of the Department of Planning and Zoning to be submitted by the Hearing Authority, the Board itself may do so sua sponte. *Cf. Maryland Board of Nursing v. Nechay*, 701 A.2d 405, 409, 347 Md. 396 (1996). (“The exercise of the court’s discretion is not triggered exclusively, our cases make clear, by a motion filed by one of the parties. The court may act to revise its judgment sua sponte ”)

located, without separate ingress and egress access to the gasoline station from Birmingham Way (frontal road), will create a hazardous condition of traffic that will use the Waverly Woods Shopping Center parking lot as a thoroughfare for ingress and egress to the gasoline station – and as such will not ensure the safe and efficient movement of traffic and pedestrians.

Petitioner's conditional use will utilize the existing access drive into the Waverly Woods Shopping Center located at the intersection of Birmingham Way. No additional road connections are proposed under this conditional use. The proposed layout of the conditional use will afford customers of the gas station no less than three (3) separate means of access into the existing parking lot servicing the Waverly Woods Shopping Center: Birmingham Way access, access near Weis supermarket from Warwick Way, and access directly opposite and across the parking lot near other tenant merchants. Petitioner's traffic consultant, Mr. Mickey Cornelius, stated that existing private access points into the Waverly Shopping Center from Warwick Drive and Birmingham Way were approved during the original development of the Waverly Woods Shopping Center and are currently in use without issue. "Currently in use without issue" does not consider the effect of subsequent traffic in the shopping center parking lot that will occur after the conditional use gasoline station is constructed.

The DPZ Technical Staff Report dated June 18, 2007 similarly reveals the following:

There is no direct access from the Gas Station to Birmingham Way. From Birmingham Way, vehicles would have to enter the shopping center parking lot from the existing driveway, and then proceed through the shopping center parking lot to reach the Gas Station. The pavement of the Gas Station circulation areas would directly adjoin the paving of the shopping center parking lot, with no separate curbs.

Notwithstanding that all traffic will ingress and egress the gasoline station by traversing the parking lot through its access points, without further consideration and evaluation as to

potential traffic patterns and conditions *within the parking lot* the DPZ Technical Staff Report of December 5, 2008 concludes the following:

Existing access points to the Site will continue to be utilized. Since the proposed Conditional Use operation is located within the parking lot of the established Shopping Center, the access points *will likely continue* to provide safe and efficient access. The *interior vehicular pattern* will afford safe and efficient vehicular and pedestrian circulation. The petition complies with Section 131.N.25.g (Emphasis added.)

This contains no discussion of the interior vehicular pattern. To hold that the access points of the parking lot “will likely continue” to provide safe and efficient access is a supposition – not an evaluation.

Petitioner Richard J. Levitan testified before the Board that he is currently operating gasoline stations from two separate locations within Howard County (Dorsey Hall and Owen Brown), both of which border residential zoning districts without issue. Inspection of these sites, however, reveals that each gas station has its own pad with ingress and egress access to a street on which it fronts, unlike the proposed conditional use, and does not necessitate circulation of traffic within the parking lots of the village centers for access to the gasoline station as proposed by this application.

When testifying, Mr. Levitan further recognized “that the existing Conditional Use Site is currently used as a parking lot facility for the Waverly Woods Shopping Center and handles motor vehicle traffic on a daily basis in connection with the commercial operations of the center, including large multi-vehicle delivery trucks which service Weis Markets and other tenants of the Waverly Woods Shopping Center on a daily basis. “

When seeking previously to build a gasoline station at a different location in the shopping center parking lot along Warwick Way, Petitioner Levitan testified at a hearing before the Zoning

Board of Howard County, Case No. 1067M.<sup>2</sup> Petitioner then recognized that “he wasn’t sure whether the gas station could be built at another location in the village center, but other locations would be less desirable because it wouldn’t be a pad [separate site with self contained ingress and egress access to the frontal road]. Locating the station elsewhere in the village center *would create circulation issues, would place the station too close to the community and could block other tenants in the center.*” (Emphasis added.)

Mr. Cornelius, Petitioner’s traffic consultant, discussed detailed traffic study counts made during existing peak traffic morning and evening traffic hours at four intersections serving the conditional use site. Based on an Institute of Transportation Engineers’ Trip Generation Handbook, Mr. Cornelius estimated that for this conditional use there would be 122 morning peak hour trips, and 161 peak evening hour trips. Based on the Handbook, he estimated that that 62% of morning peak hour trips and 56% of evening peak hour trips will be “pass by trips”—indicating that those trips would be stopping at the gas station which otherwise would be just passing traffic. With respect to present traffic study counts, the “new trips” to the gas station would be just 46 trips during the morning peak hours and 71 during the evening peak hours. Based on this data, Mr. Cornelius concluded that “the nature and intensity of the Petitioners’ conditional use at its intended location will have *no measurable impact on the streets* giving access to the Conditional Use Site or the Waverly Woods Development as a whole.” (Emphasis added.) Inasmuch as Mr. Cornelius refers to estimates that pertain only to street traffic pertinent to operation of the proposed conditional use, his conclusions relating to granting of this application are not persuasive.

---

<sup>2</sup> Convenience Retailing, LLC, Howard County Zoning Board Case No. 1067M, Decision and Order (April 17, 2008). The Board took judicial notice of this Decision and Order.

Significantly, Mr. Cornelius did not discuss the traffic flow effect *within the Waverly Woods Shopping Center* of ingress and egress to the conditional use gasoline station through the access points in the shopping center parking lot: the consequence of the gasoline station not being sited on a pad with separate ingress and egress access to Birmingham Way.

With regard to the three points of access into the shopping center parking lot which will be used as a thoroughfare to reach the gas station (two of which are Birmingham Way and Warwick Way near the Weis Markets, and the third near a string of tenants across the parking lot opposite the Warwick Way access), traffic whose destination is only to reach the gas station – rather than for shopping at the shopping center – will bear fruition of Mr. Levitan’s recognition: such location of the conditional use would create circulation issues, and would place the gas station too close to the community and would block other tenants in the center, i.e., impede existing “motor vehicle traffic on a daily basis in connection with the commercial operations of the center, including large multi-vehicle delivery trucks which service Weis Markets and other tenants of the Waverly Woods Shopping Center on a daily basis.”

This will be further exacerbated by additional traffic destined to come to the gasoline station from highways I-70 and Route 99, since the Waverly Woods Shopping Center is situated along Marriottsville Road between those roads. Mr. Levitan testified that the closest existing gasoline stations to the Waverly Woods community are located 3.7 miles and 5.1 miles away. This was confirmed by other witnesses. During the Zoning Hearing (note 2, *supra*), Mr. Cornelius observed that the County plans to widen Marriottsville Road from Route 40 to Route 99. (Route 40 is south of I-70.)

Moreover, gasoline station traffic through the primary entrance to the Shopping Center from Birmingham Way is very likely to impede the shopping center operations should traffic

back up from entering the gasoline station. With increased volume of vehicles turning into the Birmingham Way access solely to patronize the gas station, there are also potential adverse effects to pedestrian traffic from residential housing crossing into the Birmingham Way access (as related by witnesses in opposition). Further, traffic from the car wash location of the conditional use will not exit directly out to Birmingham Way but is to be routed around vehicles at the gas pumps to exit from the Birmingham Way access opening. Exiting cars backing away from the gas pumps would be backing into the lane of cars exiting from the car wash. This, too, has potential to be hazardous and create bottlenecks, and result in vehicular traffic using the parking lot as a thoroughfare to exit through the other two access points.

Inasmuch as the conditional use will not be sited on a pad with its own separate ingress and egress access to Birmingham Way, it is apparent that the conditional use proposed by Petitioner has not been designed and located to ensure safe and efficient movement of traffic and pedestrians within the Waverly Woods Shopping Center, thus contravening Regulation Section 131.N.25.g.

Inasmuch as the Technical Staff Report of the Department of Planning and Zoning of December 5, 2008 had not evaluated and addressed this issue, this case ought to have been remanded to the Department of Planning and Zoning for such consideration. Remand to the DPZ was denied by the Board.

The Board granted Petitioner's application. I respectfully dissent.

Date:

*October 27, 2009*

  
HENRY EAGLES

Member, Howard County Board of Appeals